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AB 3129 Passes California Legislature, Targeting Private Equity Health Care Transactions and Granting AG Consent Right

Health Care Law Brief on **September 7, 2024**

On August 31, 2024, the California State Assembly and State Senate passed Assembly Bill 3129 ("AB 3129"). If signed by Governor Newsom, AB 3129 would establish a comprehensive transaction review law that (i) targets private equity firms and hedge funds, and (ii) grants the Attorney General explicit consent rights over covered transactions.

This bill marks a significant shift in the regulation of private equity and hedge fund investments in health care entities within the State, only months after the California Office of Health Care Affordability ("OHCA") review process became effective. Unlike the OHCA review process which does not grant the State government affirmative rights to approve a transaction, AB 3129 grants the Attorney General such rights over a covered transaction, thereby materially expanding the State's regulatory authority over health care deal-making.

Key Transaction Provisions of AB 3129

Pursuant to AB 3129, a "private equity group" or "hedge fund" must generally provide at least 90-day pre-closing notice to, and obtain the Attorney General's consent, prior to closing a transaction with (i) a "health care facility" other than a hospital, (ii) a "provider group" (i.e., ten or more providers, or >$25M in revenues) or (iii) a "provider" if the private equity group or hedge fund has been involved, directly or indirectly, in a transaction involving a health care facility, provider group, provider, or related health care services within the past seven years (e.g., add-on acquisitions). The bill would generally apply to transactions closing on or after January 1, 2025, and to avoid duplicative filings, AB 3129 generally exempts entities subject to the law from OHCA filing requirements.

Excerpted below are key definitions:

- "**Hedge fund**" means "a pool of funds managed by investors for the purpose of earning a return on those funds, regardless of the strategies used to manage the funds. Hedge funds include, but are not limited to, a pool of funds managed or controlled by private limited partnerships." The definition excludes "natural persons or other entities that contribute, or promise to contribute, funds to the hedge fund, but otherwise do not participate in the management of the hedge fund or the fund's assets, or in any change in control of the hedge fund or the fund's assets" and "entities that solely provide or manage debt financing secured in whole or in part by the assets of a health care facility, including, but not limited to, banks and credit unions, commercial real estate lenders, bond underwriters, and trustees."
- "**Private equity group**" means "an investor or group of investors who primarily engage in the raising or returning of capital and who invests, develops, or disposes of specified assets." The definition excludes "natural persons or other entities that contribute or promise to contribute funds to the private equity group, but otherwise do not participate in the management of the private equity group or the group's assets, or in any change in control of the private equity group or the group's assets" (e.g., generally co-investors and limited partners).
- "**Provider**" means a group of two to nine licensed health professionals acting within their scope of practice, including a lawfully organized group of two to nine physicians that provides, delivers, or furnishes health care services, except for a provider group.
- "**Provider group**" means a group of 10 or more licensed health professionals acting within the scope of their practice, or a group of two to nine licensed health professionals acting within the scope of their practice that generated gross annual revenue of twenty five million dollars ($25,000,000) or more. A provider group may include any combination of licensed health professionals, but does not include a medical group practice, a professional medical corporation, or a medical partnership that provides, delivers, or furnishes health care services and is composed of nine or fewer physicians that generated gross annual revenue of less than twenty-five million dollars ($25,000,000). A provider group also does not include any combination of licensed health professionals if the primary purpose of the group is to deliver dermatology services.
- "**Transaction**" means the direct or indirect acquisition in any manner, including, but not limited to, lease, transfer, exchange, option, receipt of a conveyance, creation of a joint venture, or any other manner of purchase, by a private equity group or hedge fund of a material amount of the assets or operations, or a change of control, of a health care facility, provider group, or provider doing business in this state.

Waiver Requests for Entities Facing Financial Challenges

Of note, AB 3129 contains a mechanism allowing the Attorney General's office to waive the requirements of AB 3129, provided that an appropriate basis for the waiver is established by an applicant. Generally, the bases for requesting a waiver are limited to potential insolvency of the target. For instance, an applicant may request a waiver if the target's "operating costs have exceeded its operating revenue in the relevant market for three or more years and the party cannot meet its debts as they come due" or the target "is at grave risk of immediate business failure."

Attorney General's Review and Consent Authority

As with other health care transaction laws described on Proskauer's *Health Care Law Brief,* AB 3129's purpose is generally couched as designed to promote market competition, health care access, and affordability. Consistent with the foregoing legislative intent, the Attorney General must consider whether the transaction may have a substantial likelihood of anticompetitive effects, including a substantial risk of lessening competition or of tending to create a monopoly, or may create a significant effect on the access or availability of health care services to the affected community.

Key CPOM Provisions of AB 3129

In addition to the transaction-related notice and consent obligations imposed under the law, AB 3129 introduces certain express statutory prohibitions related to the corporate practice of medicine ("CPOM") doctrine, which were previously largely addressed, informally, in state guidance documents.

AB 3129 expressly prohibits a private equity group or hedge fund from, in part:

- Determining what diagnostic tests are appropriate for a particular condition.
- Determining the need for referrals to, or consultation with, another physician, Determining how many patients a physician, psychiatrist, or dentist shall see in a given period of time.

AB 3129 also expressly prohibits a private equity group or hedge fund from exercising control over, or being delegated the power to do, any of the following:

- Setting the parameters under which a physician, psychiatrist, dentist, or physician, psychiatric, or dental practice shall enter into contractual relationships with third-party payers.

- Setting the parameters under which a physician, psychiatrist, or dentist shall enter into contractual relationships with other physicians, psychiatrists, or dentists for the delivery of care.
- Making decisions regarding coding and billing procedures for patient care services.
- Approving the selection of medical equipment and medical supplies for the physician, psychiatric, or dental practice.

If AB 3129 is signed into law, sponsors will need to closely scrutinize their business models, contracts, and day-to-day operations to ensure compliance with AB 3129's CPOM-related prohibitions.

Implications for Sponsors

If enacted, AB 3129's broad scope, and the consent right that it grants to the Attorney General, will likely introduce a layer of uncertainty in health care deal-making in California, until such time as market participants better understand the Attorney General's enforcement and review priorities with respect to AB 3129. In addition to the pre-closing notice period delays that AB 3129 introduces, the bill imposes a layer of additional cost and filing burdens upon market participants, in contrast to other states where such transactions are not regulated and require no regulatory filings.

Governor Newsom has until September 30, 2024, to sign or veto AB 3129. If enacted, the law will take effect on January 1, 2025. This legislation represents a growing trend of state-level interventions in health care transactions, albeit one that is unusually broad in scope.

Proskauer will continue to monitor legislative developments related to health care transactions in California and in other states across the country.

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